



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
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JMTosh

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MEMORANDUM FOR CHIEF, CRIMINAL INVESTIGATION

FROM: Barry J. Finkelstein
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SUBJECT: Relevant Conduct Computations

This responds to your request regarding the inclusion of relevant conduct when computing tax loss for sentencing purposes. The issue arises from United States v. Hayes, 322 F.3d 792 (4th Cir. 2003), in which the Fourth Circuit held that while the sentencing guidelines "preserve a broad range of discretion for district courts, a court has no discretion to disregard relevant conduct in order to achieve the sentence it considers appropriate." Id. In computing relevant conduct, special agents should gather evidence that (a) is specific to the defendant; (b) is similar to or part of a similar pattern of activity related to the count(s) of conviction; and (c) meets a preponderance of the evidence standard of proof.

Relevant Conduct

Relevant conduct focuses on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range. U.S.S.G. § 1B1.3, comment. (n.1). Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. U.S.S.G. § 1B1.3, comment. (backg'd).

Specifically, U.S.S.G. § 1B1.3(a)(2) operates to bring in conduct outside the offense of conviction that is part of the same or similar pattern of activity. Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity. U.S.S.G. § 1B1.3, comment. (backg'd)(emphasis added).¹ Courts have found the relevant conduct guideline allows

¹ The background further illustrates, "in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are (continued)

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for the consideration of uncharged conduct. See United States v. Bove, 155 F.3d 44 (2nd Cir. 1998)(proper to include uncharged conduct in determining loss under tax guideline). See also United States v. Bennett, 37 F.3d 687 (1st Cir. 1994); United States v. Newbert, 952 F.2d 291 (9th Cir. 1991); United States v. Miller, 910 F.2d 1321 (6th Cir. 1990).

Thus, uncharged counts related to the defendant's same course of conduct or pattern of activity may be considered as relevant conduct in calculating the appropriate sentencing range. In criminal tax cases, therefore, additional tax loss that can be computed from uncharged conduct related to the defendant's count of conviction should be included in determining total tax loss for sentencing. Hayes is a good example of this theory. Hayes, a tax return preparer, prepared approximately 164 returns for clients between 1996 and 1998. The tax returns included false deductions for medical expenses, false charitable deductions, and false carry-over charitable deductions, which resulted in refunds for the preparer's clients to which they were not entitled. Hayes was charged with and convicted of twenty-four counts of aiding and assisting in the preparation of false tax returns for tax years 1995 through 1998.

At the original sentencing hearing, the district court calculated the tax loss based only on the twenty-four counts of conviction, which totaled \$75,814.00, and sentenced Hayes to thirty months' imprisonment. On appeal, the government argued the district court improperly refused to consider relevant conduct from sixty-three other fraudulent returns the defendant prepared but was not charged with, which would have resulted in an additional tax loss to the government of \$199,017.00. The Fourth Circuit agreed with the government and remanded the case for re-sentencing. The district court resentenced Hayes and included the relevant conduct computations, which increased Hayes' sentence by eleven months.

The relevant conduct gathered by the special agent consisted of sixty-three additional returns documented through the IRS e-file system for the 1998 tax year, as well as circular letters and questionnaires sent to clients of Hayes.

Standard of Proof

The United States Sentencing Commission states a preponderance of the evidence standard "is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." U.S.S.G. § 6A1.3, comment. Although this standard is lower than the beyond a reasonable doubt standard necessary for a conviction, it nonetheless requires the information have "a sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a).

nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction." Id.

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In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. 3661; United States v. Watts, 117 S. Ct. 633, 637 (1997) (any information may be considered, so long as it has a sufficient indicia of reliability to support its probable accuracy); Witte v. United States, 515 U.S. 389, 399-401 (1995) (sentencing courts have traditionally considered a wide range of information without the procedural protections of a criminal trial). But see United States v. Ritsema, 31 F.3d 559 (7th Cir. 1994) (there must be some logical connection between the conduct alleged to be relevant and the offense of conviction). Also, if the increase is great enough, a court may require proof by more than the usual preponderance of evidence standard. See United States v. Mezas de Jesus, 217 F.3d 638 (9th Cir. 2000). Ultimately, the sentencing court, after applying § 1B1.3, would determine whether the relevant conduct presented met the preponderance of the evidence standard of proof. See Hayes, 802.

Thus, in calculating relevant conduct for criminal tax defendants, special agents should gather evidence specific to the defendant's conduct that was the basis for the underlying conviction. In tax return preparer cases, for instance, special agents should gather evidence from the return preparer's clients, including, but not limited to, tax years the defendant prepared the client's tax returns, information included on the tax returns, and any refunds received.

Moreover, special agents should be prepared to testify at the sentencing hearing and, if the court requests, present evidence, including testimony from the defendant's clients if necessary, to meet the preponderance of the evidence standard should a dispute arise as to the relevant conduct computations. In Hayes, for example, the special agent prepared and sent letters with questionnaires to Hayes' clients requesting specific information related to Hayes' preparation of their individual tax returns. The special agent then compiled the information received into a spreadsheet. As a result, the special agent would have been able to present this evidence at the sentencing hearing to meet the preponderance of the evidence standard of proof.

Conclusion

Relevant conduct includes conduct of the defendant that is outside the offense of conviction, but is part of the same or similar pattern as the count(s) of conviction. The Guidelines and the courts require evidence of relevant conduct to have sufficient indicia of reliability to support its probable accuracy. In this regard, special agents do not need to gather as much evidence as they would need to prove the conduct beyond a reasonable doubt; however, agents must gather enough evidence so that, if required to present the evidence at the sentencing hearing, either through the agent's testimony or through witness testimony, the evidence would meet a preponderance of the evidence standard of proof.

Should you have any questions or need further assistance, please feel free to contact Jennifer Tosh of the Criminal Tax Division on (202) 622-4470.